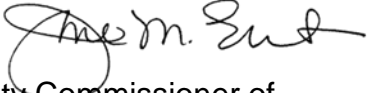





OFFICE OF STUDENT SUPPORT SERVICES
89 Washington Avenue, Room 318-M EB
Phone: (518) 486-6090; Fax: (518) 474-8299
E-mail: StudentSupportServices@nysed.gov; Web: www.p12.nysed.gov/sss

TO: District Superintendents
Superintendents of Public Schools
Charter School Leaders

FROM: Jhone M. Ebert, Senior Deputy Commissioner 
Richard J. Trautwein, Esq., Counsel and Deputy Commissioner of
Legal Affairs 

SUBJECT: Access to Students by Child Protective Services Workers in a Child
Abuse Investigation

DATE: April 22, 2016

We have been receiving reports that in reaction to an August 19, 2015 decision by Federal District Court Judge Sidney Stein of the Southern District of New York in Phillips v. County of Orange, et al. (10-CV-239), many school districts across the State have begun to restrict or deny access by Child Protective Services workers to interview students as part of child abuse investigations out of concern about possible liability. For several reasons, the State Education Department believes that such actions involve an over-reaction to a decision that did not significantly change the law in this area. All of us recognize the critical importance of investigating allegations of child abuse and taking appropriate steps to protect children from abuse, particularly where the allegations involve possible abuse by the parents. Denying Child Protective Services access to students in such circumstances can result in harm to those children and the State Education Department urges school districts to critically examine their policies and procedures relating to in-school interviews of students in child abuse investigations with that in mind and not to make decisions solely based on fear of liability.

A. Program Guidance

Based on the legal analysis set forth below, the State Education Department does not believe that such court decision is a binding precedent in the federal Second Circuit, which includes New York, that changes the law in this area on a statewide basis and requires a change in the State Education Department guidance on the subject at this time. **The State Education Department's current policy and guidance stand.** For a copy of that guidance, which is in the form of a memorandum of understanding with the Office of Children and Family Services, see <http://www.p12.nysed.gov/sss/pps/educationalneglect/>.

However, we believe that the latest decision in Phillips v. County of Orange, et al., does highlight uncertainties in the applicable law, which is evolving, and the need for greater clarity

in the obligations of school districts under Social Services Law §425(1). In light of our recent discussions with the field and attention to this important matter, the Department will continue to engage in dialogue with key stakeholders to determine whether a change in statute is appropriate and necessary in order to protect the health and safety of our children across the State and minimize the possibility of future risk of liability to school districts and school district personnel who permit CPS workers to interview students in child abuse investigations should other courts adopt the reasoning of Phillips v. County of Orange. Again, in the interim, unless and until there is a binding precedent in the Second Circuit, the State Education Department's current policy and guidance stand.

Key excerpts from the State Education Department's guidance are as follows:

When allegations or circumstances included in a report or factors that arise during an investigation make it advisable to interview the child(ren) apart from the family, the school should cooperate with CPS in the investigative process. Social Services Law, §425(1) provides that school districts, as political subdivisions of the State, must provide the New York State Office of Children and Family Services (OCFS) and CPS with such assistance and data as are necessary to enable them to fulfill their CPS responsibilities.

The circumstances or allegations which may, but do not necessarily, prompt a decision by CPS to interview a child at school, include but are not limited to:

- bruises inflicted by parents;
- unusual punishments;
- unattended illness;
- child fearful of returning home; and
- sexual abuse

Interviewing a child in his/her school setting is predicated upon ongoing cooperation and dialogue with school authorities so that both the CPS caseworker and the school authorities understand each other's policies, responsibilities and procedures. The school district and social services district may want to develop procedures setting forth how and when interviews of children will be conducted at school.

In general, circumstances where a child may be in imminent danger, where time is a factor, or where other considerations exist (for example, the child expresses a need to speak privately with the CPS caseworker) may make it advisable for CPS to interview a child at school. This could occur prior to or following CPS interviewing the parents.

In making the decision whether to interview the child at school, it should be kept in mind also that interviewing a child in school may have negative consequences such as:

- disrupting the child's school routine
- calling special attention to an allegation about a problem at home which in fact may not be a problem or may not be sufficiently significant to warrant such extraordinary attention; and

- upsetting the parent to the extent that the parent's communication will become extremely guarded out of suspicion or fear, or completely cut off

The Department and OCFS agree that interviews with children both when the school is and is not the source of the report are permissible. The Department and OCFS also agree that a school official should generally be present during the interview. However, the school official and CPS may decide the school official could be absent during the interview when the school official and the CPS caseworker agree that the presence of the school official is not essential to protect the interests of the pupil, and the absence of the school official may increase the likelihood that the caseworker can accomplish the purposes of the interview.

Districts should contact their own counsel regarding these situations to ensure legal and procedural safeguards are in place to protect students' rights and that local school policies are followed.

B. Legal Analysis

In the August 19, 2015 decision, which District Judge Stein read into the record, he concluded that the in-school interview constituted a "seizure" for the purposes of the Fourth Amendment right to be free of unreasonable searches and seizures, and that on the record before him the County of Orange had conducted an unreasonable seizure in violation of the Fourth Amendment. The critical determination that an in-school interview of a student in a child abuse investigation constitutes a "seizure" was actually first made in 2012 in a previous decision in the same case on a motion to dismiss the complaint (,See, Phillips v. County of Orange, et al. 894 F. Supp. 2d 345, 359-363 [SDNY 2012]). Thus, the issue is not new. Judge Stein concluded that the in-school interview was an unreasonable seizure in violation of the Fourth Amendment and that the County of Orange was liable to the parents. He did not determine that the school district involved was liable to the parents for that unconstitutional seizure. Instead, he determined that there was a triable issue of fact on whether the school district was required by law to permit CPS to interview students without parental consent or notification, and on that basis would be immune from liability. In other words, Judge Stein left open the question of whether the school district could be held liable for complying with State law, citing to the Second Circuit decision in Vives v. City of New York, 524 F.3d 346 [2d Cir. 2008). According to Court records, the case was subsequently settled, so there was no final decision on the liability of the school district.

Both Justice Stein's August 19, 2015 decision and the Southern District Court's earlier decision in the Phillips v. County of Orange case relied in part on a decision of the 7th Circuit Court of Appeals in Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) in which the 7th Circuit determined that an in-school interview of a child by Child Protective Services caseworkers can constitute a seizure for purposes of the Fourth Amendment. As both decisions in Phillips v. County of Orange recognized, the Second Circuit Court of Appeals, which has jurisdiction over New York, has not addressed whether an in-school interview of a child in a child abuse investigation can constitute a seizure. At least one other Federal Circuit Court of Appeals has declined to follow the 7th Circuit's decision in Doe v. Heck, supra. In Loftus v. Clark-Moore, 690 F.3d 1200, 1205-1206 (11th Cir. 2012), the 11th Circuit Court of Appeals determined that

the 7th Circuit's decision in Doe v. Heck cannot constitute "clearly established law" in the 11th Circuit that would deprive a Florida social worker of qualified immunity that would protect that caseworker from liability for interrogating a student at school. The 11th Circuit concluded that there was "no controlling case law that establishes that it is unreasonable for a Florida social worker to interrogate a minor at her school during the course of an investigation of allegations of child abuse." Id. at 1205. Concluding that the social worker was entitled to qualified immunity, the 11th Circuit determined that the social worker could not be held to a standard of conduct involving law that is unsettled in the U.S. Supreme Court, the 11th Circuit and the State's highest court. Id. at 1205-1206. Thus, there actually is a split in the Federal Circuit Courts of Appeals on this issue.

In New York, Social Services Law §425(1) provides that school districts, as political subdivisions of the State, have a duty to provide the New York State Office of Children and Family Services (OCFS) and local child protective services with such assistance and data as are necessary to enable them to fulfill their CPS responsibilities properly. The Department has been advised that the Commissioner of the Office of Children and Family Services has interpreted Social Services Law §§ 424 and 425(1) to mean that school districts are required to cooperate by allowing local child protective services workers in a child abuse investigation to interview students without parental notice or consent. As the agency charged with interpreting and enforcing the Social Services Law, that interpretation should be entitled to deference.

The situation in which we find ourselves is that we now have decisions by one federal District Court in one case concluding that the County of Orange could be held liable under the Fourth Amendment for conducting an in-school interview of a child and finding that a question of fact existed on whether the school district was required by law to permit CPS to interview students without parental consent or notification, and on that basis would be immune from liability. However, while the District Court decisions in Phillips v. County of Orange may or may not be persuasive, they are not binding precedent in other Federal District Courts. In that regard, the U.S. Supreme Court has ruled that "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." Camreta v. Greene, 563 U.S. 692, 131 S. Ct. 2020, 2033, 179 L. Ed. 2d 1118 (2011), *citing*, 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed.2011) [emphasis added]. The Second Circuit Court of Appeals has not yet ruled on whether an in-school interview of a student during a child abuse investigation is a "seizure" for Fourth Amendment purposes, nor has it ruled on the standard that must be applied if it is a seizure to determine if it is reasonable, which means that the law in this Circuit is unsettled on those legal issues. The Fourth Amendment only prohibits an unreasonable search or seizure. The U.S. Supreme Court, in New Jersey v. T.L.O., 369 U.S. 325, 341-42 (1985) held that in a school setting a search is reasonable for Fourth Amendment purposes where it is "justified at its inception" and reasonably related to the scope to the circumstances that justified the search. The Supreme Court ruled that a search is "justified at its inception" where there are reasonable grounds for suspecting that the search will turn up evidence that the student is violating the law or school rules. Id. At least one New York District Court has applied the T.L.O. standards to a seizure on school property. See, Mislin v. City of Tonawanda School District, 2007 WL 952048, 02 Civ 273S (W.D.N.Y. 2007). Before a school district or its employees could be held liable, there would need to be a determination

that the seizure was unreasonable, and if the T.L.O. standards apply, a determination would need to be made on whether it is justified at its inception because of the mandates of Social Services Law § 425(1). Moreover, before school district employee actually could be found liable for violating the child's Fourth Amendment rights by allowing an in-school interview, there would need to be a determination of whether a school district employee who in good faith allows a child protective services worker access to a student in school in furtherance of its duty to cooperate with child protective services under Social Services Law §425(1) is entitled to qualified immunity that shield it them from liability and before a school district could be held liable there would need to be a determination of whether the requirements of Social Services Law §425(1) shield it from liability based on its obligation to comply with that State law.

Under these circumstances, in which the relevant constitutional law is unsettled in the Second Circuit and no New York Court has held that a school district allowing an in-district interview by local child protective services is liable in damages for doing so, the State Education Department's current policy and guidance on this issue stand. If school districts have concerns about possible liability should future courts follow the reasoning of the decisions in Phillips v. County of Orange, they need to consult with their school attorneys about whether the school district employees are entitled to qualified immunity when they allow local child protective services access to students and whether the school district is protected from liability based on the mandate of Social Services Law §425(1). In all cases, districts should contact their own counsel regarding these situations to ensure legal and procedural safeguards are in place to protect students' rights and their health and safety and that local school policies are followed.

cc: Commissioner MaryEllen Elia
Beth Berlin
Angelica Infante
Renee Rider
Alison Bianchi
Jay Worona, Esq.
Joseph Shields, Esq.